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Brf. of Newlett for C. C. C.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

JOHN BROWNFIELD, *Plaintiff in Error,*

vs.

THE STATE OF SOUTH CAROLINA,

Defendant in Error.

No. 172.

Brief of Plaintiff in Error.

S. M. Newlett

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W. J. WHIPPER,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

JOHN BROWNFIELD, *Plaintiff in Error*,
vs.
THE STATE OF SOUTH CAROLINA,
Defendant in Error.
} No. 172.

BRIEF OF PLAINTIFF IN ERROR.

Statement of The Case.

The plaintiff in error, a negro, was indicted at the November Term, 1900, of the Court of General Sessions for Georgetown County, State of South Carolina, held at the City of Georgetown, County of Georgetown, and State of South Carolina, for the crime of murder, tried and convicted and the death penalty assessed against him. From the ruling, judgment and sentence of the said Court of General Sessions, made in the trial of said case, the plaintiff in error appealed to the Supreme Court of South Carolina which is the highest Court of the said State for the trial of criminal matters, and the judgment of the lower Court was, by said Supreme Court, affirmed. The plaintiff in error, therefore, brings his case, by writ of error to this Honorable Court for final review. A Federal question is involved in the case, relative to the matter of discrimination

against negroes being summoned to serve as grand and petit jurors in the Court of General Sessions in and for the County of Georgetown, State of South Carolina, on account of their race and color. This question of discrimination was raised by the plaintiff in error in the said Court of General Sessions before his plea was entered, by the filing of motions to quash the indictment against him and the venire of petit jurors on the ground of said discrimination, as will appear by reference to the Record in this case at pages 5 and 6. After presenting his said motions to the Court, which were in writing, and verified, the plaintiff in error asked leave of the Court to introduce evidence and offered to introduce evidence to prove the fact of discrimination set out in his said motions, but the Court refused to allow the plaintiff in error to introduce such evidence and overruled the said motions as they were made and filed, and the plaintiff in error, by his counsels, excepted to said ruling. (See Record, p. 6) In the Supreme Court of South Carolina, on the trial of the appeal by said Court, the exceptions to the rulings of the lower Court (Court of General Sessions for Georgetown County) on this Federal question were assigned as error, (See Record p. 10) and after judgment in said Supreme Court, affirming the judgment of the trial Court on the question of race discrimination, the exceptions reserved to the rulings of the trial Court, upon said questions were especially presented to the attention of the said Supreme Court by plaintiff in error, in his petition for writ of error. (See Record p. .)

Assignment of Errors.

I.

The Supreme Court should have reversed the ruling, judgment and sentence in this case, because of the error in the trial Court in overruling the motions of

the plaintiff in error to quash the indictment, and to challenge the arrays of grand and petit jurors; said motions having been made on the ground that the jury commissioners appointed to select the grand jury, which found and presented said indictment, and also to select the list of jurors from which the panel was drawn which tried the plaintiff in error, selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury or panel of petit jurors, but on the contrary did exclude from the list of persons to serve as such grand and petit jurors all colored persons or persons of African descent, known as negroes, because of their race and color; and that said grand jury and list of petit jurors were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about four-fifths, or at least a large majority, of the population and of the registered voters of the City and County of Georgetown, and although otherwise qualified to serve as such grand and petit jurors, were excluded from such service on account of their race and color and have been so excluded from serving on any jury in the Court of General Sessions for Georgetown County for a considerable time back, which is a discrimination against the plaintiff in error, since he is a person of color and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the constitution and laws of the United States, to which rulings of the Court the plaintiff in error duly excepted as appears by the Record, at page 6.

II.

The Supreme Court should have reversed the judgment of the trial Court in this case, because the said Court erred in failing to receive the testimony offered

by the plaintiff in error in support of the allegations of his motion to quash the indictment and to challenge the arrays of grand and petit juries, and in overruling the said motion without permitting an investigation of the matters of facts therein alleged; to which action of the Court the plaintiff in error duly excepted, which exception appears in the Record at page 6, and because, as the allegations of the motions to quash were not controverted or denied by the attorney for the State, they should have been considered as true.

III.

The Supreme Court should have reversed the judgment of the trial Court because the Record, at page 6, shows that the plaintiff in error did actually offer to introduce testimony to support the allegations of his motions and the fact that counsels agreed to accept statement of the trial Judge as to his ruling on the motions as appears by the Record at page 9, did not bind the plaintiff in error by the statement of said Judge as to his reasons for overruling the motion to quash the venire as stated in the opinion of the Supreme Court (See Record, p. 14.) Besides this fact, the Record will show at page 9 that the trial Judge, in his statement as to his rulings on the motion to quash the venire in no wise affects the undisputed fact in the Record, at page 6, that "the motion to quash the indictment being overruled, the defendant's counsels excepted" and that "the defendant offered to introduce testimony to support these grounds."

That part of the record above referred to, and at page 5, folio 17, of the "Points and Authorities" which were properly filed and read in the Supreme Court of So. Ca. by the attorneys for the plaintiff in error, on the hearing of the appeal by said Court, show that the plaintiff in error did contend in the said Supreme Court that he offered to introduce evidence to prove the allega-

tions of his motions aforesaid and was prevented from doing so, and did not omit such contention as stated in the opinion of the Honorable the Supreme Court of South Carolina, filed in this case on the 4th day of June, A. D. 1901. In order to bring plainly to the attention of this Honorable Court the errors of the trial Court upon which we rely in asking the reversal of the judgment of said trial Court, we here insert our first and second exceptions made to the rulings, judgment and sentence of said Court.

First Exception.

Because his Honor, Judge Gary, the presiding Judge, erred in refusing defendant's motion to quash the indictment on the ground that there was no member of the race to which the defendant belongs on the grand jury that found the said bill of indictment.

Second Exception.

Because his Honor, Judge Gary, the presiding Judge, erred in refusing challenge to the array of grand and petit jurors on same ground, and the fact that the defendant after excepting to the ruling of the trial Judge in overruling his motion to quash as shown by Record, p. 5, offered to introduce testimony to prove the allegations of discrimination in said motions and was prevented from doing so. (See Record p. 6.)

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Attorneys for Defendant-Appelant.

ARGUMENT.

As to our Exceptions.

Did we make the motion to quash at the proper time? We think so. Section 56 of the Criminal Statute of South Carolina (1893) contains the following provision; "Every objection to an indictment for any defect

appearing upon the face thereof shall be taken by demurrer, or on motion to quash such indictment, before the jury shall be sworn and not afterwards." It is shown by the Record, pp. 5-6, that the motion to quash was made before the trial jury had been sworn, and even before the defendant pleaded to the indictment. The Supreme Court of South Carolina, in the case of the State vs. Adkinson, reported in 33 S. C., at page 100, says: "The Supreme Court will not consider error imputed to trial judge for refusing to quash indictment when the case does not show that motion therefor was made." We infer from that, that as the Record does show, at pp. 5-6, that the motion to quash was made, the said Court would have considered the error here imputed to the trial judge in refusing to quash the indictment in this case. In the case of Seth Carter, plaintiff in error vs. The State of Texas, decided April 16, 1900, the Supreme Court of the United States says: "When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken, either by plea in abatement or by motion to quash the indictment, before pleading in bar. This proposition is supported in United States vs. Gale, 109 U.S., 65, 67. As to the selections of the grand jury the Criminal Statute of South Carolina (1893) at Section 38 thereof, says: "The Clerk of the Court of General Sessionsin each county not less than fifteen days before the commencement of the first term of the Court, in each year, shall issue writs of venire facias, in each county for eighteen grand jurors to be returned to that Court, who shall be held to serve at each term thereof throughout the year, and until another grand jury is empaneled in their stead? and in the absence of any proof to the contrary, it is a presumption of law that the jury commissioners spoken of in the Record, p. 5, did their

duty in drawing the grand jury which found the indictment recited in the Record, p. 4, as required by Section 38 of the Criminal Statute of South Carolina (1893) at least fifteen days before the commencement of the first term of the Court of General Sessions for Georgetown County, which was four months or more before the commission of the ottence with which the defendant herein is charged, as shown by the indictment set out in the Record as aforesaid. Because the Code of Civil Procedure of South Carolina (1893), Section 17, provides as follows: "The State is divided into eight Circuits as follows: The Counties of Sumter, Clarendon, Williamsburg, Georgetown and Florence, shall constitute the Third Circuit," and Section 20 of same code has this provision: "The Circuit Courts of the Third Circuit shall be held as follows: The Court of the General Sessions at Geogetown, for the County of Georgetown, on the second Monday in February, the second Monday in May and the seventh Monday after the third Monday in September," and that the last mentioned term in 1900 was the second Monday in November, the term in which the defendant herein was tried. Were the negroes or persons of African descent qualified as grand jurors excluded from the list of grand jurors by the jury commissioners on account of their race and color? We think so; because the defendant so alleged in his motion to quash, verified said motion and offered to produce witnesses to prove such allegations, but was not allowed to do so and was prevented from doing so, as set out in the Record as aforesaid. The allegations of the motion to quash, having been verified by the defendant and not controverted nor denied by the attorney for the State, are presumed to be true. In Smith vs. Mississippi, reported in 162 U. S., page 592, 601, and Williams vs. Mississippi, 170 U. S., page 213, the Court says: "The motion to quash an indictment on the ground that the constitution of

the grand jury is excepted to, based upon allegations of fact not appearing in the record, those allegations if controverted by the attorney for the State, must be supported by evidence on part of the defendant." We contend, therefore, that it necessarily follows that where the allegations of the motion to quash on this ground are not controverted or denied by the attorney for the State, as in this case, the defendant is not required to produce evidence in support of such allegations, but those allegations must be taken as true. Art. 5, Sec. 22, of the Constitution of South Carolina, (1895) says: "Each juror must be a qualified elector under the provisions of this Constitution of South Carolina, between the ages of twenty-one and sixty-five years, and of good moral character." His Honor, the trial Judge, gives as one of his reasons for overruling the motion to quash this quotation. We submit that if this section of the constitution justifies the jury commissioners in excluding all persons of the African race or of African descent, known as negroes, from serving as grand jurors, as set out in the motion to quash the indictment, then the section is contrary to the constitution and laws of the United States. We take the position that the action of the jury commissioners as alleged in defendant's motion to quash the indictment, is contrary to the constitution of the United States. In the case of Seth Carter, plaintiff in error, vs. the State of Texas, decided April 16, 1900, by the Supreme Court of the United States, the Court, speaking through Mr. Justice Gray says: "Whenever, by any action of a State, whether through its legislative, through its Courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race and color from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the law is denied to him, contrary to the fourteenth amend-

ment of the Constitution of the United States. Strauder vs. West Virginia, 100 U. S., 303; Neal vs. Delaware, 103 U. S., 370, 397; Gibson vs. Mississippi, 162 U. S., 565." It is therefore our contention that if this section of the Constitution of South Carolina, or any law or laws,or act or acts enacted or passed and are of force, justify the jury commissioners in excluding all members of the race to which the defendant herein belongs from serving as grand jurors, as alleged in defendant's motion to quash the indictment, then the State of South Carolina, through its agents or officers, has denied the said defendant the equal protection of the laws and thereby violated the fourteenth amendment to the Constitution of the United States. The question of race discrimination against the negroes in the courts of this country, especially those of the Southern States, has been so frequently passed upon by this Honorable Court that we deem it unnecessary to argue more extensively. We think that the case at bar differs from the case of Smith vs. Mississippi, 162 U. S.; Gibson vs. Mississippi, 162 U. S., and Williams vs. Mississippi, 170 U. S., quoted in the opinions of the Honorable the Supreme Court of South Carolina, rendered in the case, but it is exactly like the case of Seth Carter vs. Texas, 177 United States, 442, in that the plaintiff in error swears that the allegations of his motion are true of his own knowledge (not upon information and belief, as in Smith vs. Mississippi; and that he asked leave to introduce evidence and offered to introduce evidence in support of his motions to quash the indictment and the venire of petit jurors, and was denied this right by the Court who refused to hear any evidence as to the truth of the allegations of said motions, as set out in the brief used in the State Supreme Court in this case. (See Record, p. 6.) As in the case of Seth Carter vs. Texas, 177 United States, 442, the case hinges greatly

upon that point. We contend that the tender of proof (which the Court refused to hear) by the plaintiff in error in the trial Court, of the allegations of the motions to quash the indictment and the venire in that Court, said allegations not having been controverted by the attorney for the State, was sufficient and should get for him a reversal in this Honorable Court. In Smith vs. Mississippi and Williams vs. Mississippi, the Court said that the allegations of motions of this kind must be supported by evidence on the part of the defendant if controverted or denied by the attorney for the State, and that case was quoted by the United States Supreme Court in Carter vs. Texas, which is a case exactly like the one at bar. The plaintiff in error contends that the uncontroverted and undenied allegations of his motions to quash the indictment and venire in the trial Court, verified by him of his own knowledge, together with his offer of proof were sufficient and the judgment of the trial Court should be reversed. E. L. Mitchell

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